



DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2022-0134]

Definitions of Broker and Bona Fide Agents

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice; request for comments.

SUMMARY: FMCSA is requesting responses to a number of questions in order to inform future guidance on the definitions of *broker* and *bona fide agents*. FMCSA is required to issue guidance by November 15, 2022, in response to the Infrastructure Investment and Jobs Act (IIJA).

DATES: Comments on this notice must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments bearing the Federal Docket Management System Docket ID FMCSA-2022-0134 using any of the following methods:

- Federal eRulemaking Portal: Go to www.regulations.gov. Follow the online instructions for submitting comments.
- Mail: Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.
- Hand Delivery or Courier: West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- Fax: (202) 493-2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to www.regulations.gov, including any personal information included in a comment. Please see the Privacy heading below.

Docket: For access to the docket to read background documents or comments, go to www.regulations.gov at any time or visit Room W12-140 on the ground level of the West Building, DOT, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments online.

Privacy: In accordance with 5 USC 553(c), DOT solicits comments from the public to better inform its guidance process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Secrist, Registration, Licensing, and Insurance Division, Office of Registration and Safety Information, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, (202) 385-2367, jeff.secrist@dot.gov. If you have questions on viewing or submitting material to the docket, contact Dockets Operations, (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA-2022-0134), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to <https://www.regulations.gov/docket/FMCSA-2022-0134/document>, click on this notice, click “Comment,” and type your comment into the text box on the following screen.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

II. Background

Currently, *broker* is defined in 49 U.S.C. 13102(2) as a “person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.” It is also defined in 49 CFR 371.2(a) as a “person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have

accepted and legally bound themselves to transport.” In that same section, *bona fide agents* are defined as “persons who are part of the normal organization of a motor carrier and perform duties under the carrier’s directions pursuant to a preexisting agreement which provides for a continuing relationship, precluding the exercise of discretion on the part of the agent in allocating traffic between the carrier and others.” 49 CFR 371.2(b).

Over the past decade, FMCSA has received numerous inquiries and several petitions related to the definition of a broker.¹ FMCSA is aware that there is significant stakeholder interest in FMCSA’s unauthorized brokerage enforcement. On November 15, 2021, The President signed the IIJA into law. (Pub. L. 117-58, 135 Stat. 429) Section 23021 of the IIJA² directed the Secretary (FMCSA) to issue guidance, within 1 year of the date of enactment of the IIJA, clarifying the definitions of the terms *broker* and *bona fide agents* in 49 CFR 371.2. The guidance must take into consideration the extent to which technology has changed the nature of freight brokerage, the role of bona fide agents, and other aspects of the freight transportation industry. Additionally, when issuing the guidance, FMCSA must, at a minimum: (1) examine the role of a dispatch service in the transportation industry; (2) examine the extent to which dispatch services could be considered brokers or bona fide agents; and (3) clarify the level of financial penalties for unauthorized brokerage activities under 49 U.S.C. 14916, applicable to a dispatch service.

III. Questions

FMCSA is requesting comment on the following questions, to inform the agency as it completes the guidance required by the IIJA. Please identify the question you are responding to in each section of your comments.

1. What evaluation criteria should FMCSA use when determining whether a

¹ A list of open and closed petitions for rulemaking is available at <https://www.fmcsa.dot.gov/regulations/petitions-0>.

² The full text is available at congress.gov/117/plaws/publ58/PLAW-117publ58.pdf.

business model/entity meets the definition of a broker?

2. Provide examples of operations that meet the definition of *broker* in 49 CFR 371.2 and examples of operations that do not meet the definition in 49 CFR 371.2.
3. What role should the possession of money exchanged between shippers and motor carriers in a brokered transaction play in determining whether one is conducting brokerage or not?
4. How would you define the term *dispatch service*? Is there a commonly accepted definition? What role do dispatch services play in the transportation industry?
5. To the best of your knowledge, do dispatch services need to obtain a business license/Employer Identification Number from the State in which they primarily conduct business?
6. Some “dispatch services” cite 49 CFR 371.2(b) as the reason they do not obtain FMCSA brokerage authority registration in order to conduct their operations. As noted above, section 371.2(b) states that bona fide agents are “persons who are part of the normal organization of a motor carrier and perform duties under the carrier’s directions pursuant to a pre-existing agreement which provides for a continuing relationship, precluding the exercise of discretion on the part of the agent in allocating traffic between the carrier and others.” Some dispatch services interpret this regulation as allowing them to represent more than one carrier yet not obtain broker operating authority registration. Others interpret this regulation to argue that a dispatch service can only represent one carrier without obtaining broker authority. What should FMCSA consider when determining if a dispatch service needs to obtain broker operating authority?
7. If a dispatch service represents more than one carrier, does this in and of itself make it a broker operating without authority?
8. When should a dispatch service be considered a *bona fide agent*?
9. What role do bona fide agents play in the transportation of freight?

10. Electronic bulletin boards match shippers and carriers for a fee. The fee is a membership fee to have access to the bulletin board information. Should electronic bulletin boards be considered brokers and required to register with FMCSA to obtain broker operating authority? If so, when and why?
11. How has technology changed the nature of freight brokerage, and how should these changes be reflected, if at all, in FMCSA's guidance?
12. Are there other business models/services, other than dispatch services and electronic bulletin boards, that should be considered when clarifying the definition of *broker*?
13. Are there other aspects of the freight transportation industry that FMCSA should consider in issuing guidance pertaining to the definitions of *broker* and *bona fide agents*?

Robin Hutcheson,
Deputy Administrator.